

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2003-326-C and 2003-327-C - ORDER NO. 2004-500

OCTOBER 14, 2004

IN RE: Docket No. 2003-326-C – Analysis of)	ORDER DENYING
Continued Availability of Unbundled Local)	RECONSIDERATION
Switching for Mass Market Customers)	
Pursuant to the FCC’s Triennial Review)	
Order)	
)	
and)	
)	
Docket No. 2003-327-C – Availability of)	
Unbundled High Capacity Loops at Certain)	
Locations and Unbundled High Capacity)	
Transport on Certain Routes Pursuant to the)	
FCC’s Triennial Review Order)	

This matter comes before the Public Service Commission of South Carolina (the “Commission”) upon the Petition for Reconsideration of Order No. 2003-730 (“the Petition”) that was filed by the South Carolina Telephone Coalition and South Carolina Net, Inc. (the “Petitioners”) on or about January 12, 2004. Petitioners seek reconsideration of Order No. 2003-730 in which the Commission established procedures designed to expedite the completion of discovery so that a complete record can be developed in this proceeding in time for the Commission to comply with the very tight timeframes imposed upon it by the Federal Communications Commission (“FCC”) in its

Triennial Review Order.¹ In support of their Petition, the Petitioners argue that: (1) they did not have an opportunity to be heard regarding the matters set forth in the Initial Procedural Order; (2) the procedures the Commission has adopted in these proceedings vary from the South Carolina Rules of Civil Procedure and from the Commission's discovery rules; and (3) the Initial Procedural Order "may allow" other parties to impose an undue burden on the Petitioners and "could potentially" be used to subject Petitioners to "numerous and lengthy depositions." For the reasons set forth below, the Commission finds that the Petition should be denied.

I. BACKGROUND

As set forth in more detail in Order No. 2003-728 that the Commission entered in this docket on December 17, 2003, the FCC has directed the Commission to apply various triggers and other analyses developed by the FCC to determine the extent to which certain loop, transport, and switching facilities will remain unbundled network elements ("UNEs") in South Carolina. *See* Order No. 2003-728 at p. 2. Applying these triggers and other analyses requires the Commission to consider a great deal of carrier-specific information at a "granular" level, and the Commission is expected to make various findings within nine months of the effective date of the FCC's *Triennial Review Order*. *Id.* The Commission has noted that it "will want the record in these proceedings

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; and Deployment of Wireline Service Offering Advanced Telecommunications Capability*, 2003 WL 22175730 (F.C.C.), 30 Communications Reg. (P&F) 1 (Rel. August 21, 2003).

to include as much information as possible.” *Id.* at p. 3. For that reason, the Commission has ordered that all entities that have a certificate to operate as a telephone utility in South Carolina are parties to these proceedings for the limited purpose of discovery. *See Id.* at p. 4.

On November 12, 2003, BellSouth Telecommunications, Inc. (“BellSouth”) and the Competitive Carriers of the South, Inc. (“CompSouth”) filed a Joint Motion for Initial Procedural Order with the Commission. This Motion provides, in part, that:

In light of activity in similar proceedings in other states in BellSouth's nine-state operating region, BellSouth and CompSouth anticipate voluminous discovery in this docket. BellSouth and CompSouth have worked closely to develop a Proposed Initial Procedural Order that: (a) provides discovery rights to all parties in a manner that accommodates the compressed time frames necessary to meet the nine-month deadline that the FCC has imposed upon the Commission in these proceedings; (b) allows parties to make use of website posting and electronic service to the fullest extent practicable in order to avoid the time and expense associated with filing and serving multiple copies of voluminous documents; and (c) is consistent with proposed procedural orders submitted to other state Commissions within BellSouth's nine-state operating region.

On December 17, 2003, the Commission issued Order No. 2003-730 (“the Initial Procedural Order”), which grants the Motion of BellSouth and CompSouth.

Under the Initial Procedural Order, any entity that is served with discovery in this proceeding may object to responding to that discovery. *See* Initial Procedural Order at p. 4, §2(A)(iv)(a). Such objections may include, but are not limited to, legal objections and objections to the time required for the production of region-wide discovery responses. *Id.* Parties are admonished to work together to resolve discovery disputes, *see Id.* at p. 4, §2(A)(iii), and if they cannot resolve such disputes among themselves, they “shall seek expedited ruling on any discovery dispute, and the Executive Assistant to the

Commissioners, or her designee, shall resolve any such dispute expeditiously." *Id.* at p.5, §2(A)(v). The rulings of the Executive Assistant to the Commissioners are subject to being overruled by the Commission. *Id.*

The Initial Procedural Order also provides that "[d]epositions of employees, consultants, contractors and agents may be taken pursuant to the South Carolina Rules of Civil Procedure, including any objections that may be raised." *Id.* at p. 5, §2(B)(i)(emphasis added). It then sets forth deposition requirements that are designed to "conserve the resources of the parties and to encourage the parties to work jointly and cooperatively to conduct necessary discovery." *Id.* at p.6, §2(B)(ii)(d). Finally, the Initial Procedural Order provides that

If the parties have a dispute regarding the taking of depositions in any particular situation, the parties are admonished to work together to resolve such differences, and if those differences cannot be reconciled, the parties should be prepared to present a very brief explanation of the dispute and the aggrieved party should be prepared to demonstrate how it is prejudiced by its failure to comply with the requests or objections of the opposing party.

Id. at p.6, §2(B)(ii)(d).

II. DISCUSSION

The Commission has carefully considered the Petitioners' arguments supporting their Petition, and each of those arguments is addressed below.

A. Prior Notice and Opportunity to be Heard

The Petitioners argue that they had no "prior notice" or "adequate opportunity to participate" in the development of the Initial Procedural Order. *See* Petition at p. 2, ¶¶1, 3. The Commission notes, however, that the fact that the Commission would be initiating

these proceedings could have come as no surprise to any telephone utility in light of the FCC's Triennial Review Order. Beyond that, the Commission's Staff noticed and conducted three public workshops addressing issues related to the FCC's *Triennial Review Order*, and representatives of the Petitioners attended one or more of these workshops. These notices were, at a minimum, published on the Commission's website and in *The State* newspaper. After these workshops were held, the Commission issued an Order establishing the instant proceedings, and that Order was posted on the Commission's website. Subsequently, on November 12, 2003, BellSouth and CompSouth filed their Motion for Initial Procedural Order.

When the Commission granted the Motion for Initial Procedural Order dated December 17, 2003, ten (10) entities had intervened as parties of record in these proceedings. The Petitioners had at least as much prior notice of these proceedings, and of the Joint Motion for Initial Procedural Order, as these parties had. If they had desired to do so, the Petitioners could have intervened and opposed the Joint Motion, or they could have otherwise raised any concerns they may have had, prior to the Commission's issuance of the Initial Procedural Order. The Commission, therefore, finds that the Petitioners were not deprived of notice and an opportunity to participate in the development of the Order.

B. Variance from Rules

The Petitioners argue that "[t]he [Initial Procedural] Order sets forth rules with respect to discovery in these proceedings that vary significantly from the South Carolina Rules of Civil Procedure and from the Commission's own discovery rules." *See* Petition

at p.2, ¶2. To the extent that the procedures in the Initial Procedural Order vary from the Commission's discovery rules, we note that Commission Regulation 103-800(B) expressly provides that the Commission's "adoption of these [procedural] rules shall in no way preclude th[is] ... Commission from altering, amending or revoking them in whole or in part, or from making additions thereto, pursuant to provisions of law, upon petition of a proper party or upon its own motion." Particularly in light of the very tight timeframes under which the FCC has directed this Commission to conduct these proceedings, the Commission clearly was authorized under Regulation 103-800(B) to adopt the Initial Procedural Order. The Petitioners cite no valid basis for altering or amending that Order, and we decline to do.

The only provision of the South Carolina Rules of Civil Procedure that the Petitioners cite as being inconsistent with the Initial Procedural Order is Rule 33(b)(8). *See* Petition at p.3, ¶5. This rule generally limits the number of interrogatories a party can serve to "fifty questions including subparts, except by leave of court upon good cause shown." S.C.R. Civ. P. 33(b)(8)(emphasis added). In considering whether good cause is shown for not imposing such a limit in this proceeding, the Commission has considered Rule 26(a) of the South Carolina Rules of Civil Procedure. This Rule provides that in considering whether to limit the use of discovery methods in a proceeding, a court must "tak[e] into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Assuming without deciding that the "limitations on the [Petitioners'] resources" weighs in favor of the Petitioners' request for a fifty-question limit, the other enumerated factors weigh

overwhelmingly against such a limit. For the reasons explained in Order No. 2003-728, the record in this proceeding needs to “include as much information as possible.” *Id.* at p. 3. Moreover, it is clear from the FCC’s discussion throughout its *Triennial Review Order* that the amounts and issues in controversy are substantial by any measure, and there can be no legitimate dispute that the issues at stake in this proceeding are extremely important.

Accordingly, rather than arbitrarily establishing a limit on the number of interrogatories that can be served in this proceeding, the Commission finds that it is more appropriate for the Petitioners (and any other recipient of discovery) to file objections if and when they believe that they have been served with discovery that is excessive, taking into account the discussion above. This approach, which is embodied in the Initial Procedural Order, will afford Petitioners an opportunity for protection against unreasonable discovery requests without depriving other parties of an opportunity to collect information that is relevant to the significant and important matters the Commission must decide in these proceedings. The Commission, therefore, denies the Petitioner’s request to limit discovery to 50 interrogatories, including subparts.

C. Potential for Unduly Burdensome Discovery

The Petitioners argue that “[t]he procedures contained in the Order are such that they may allow other parties to impose an undue burden” on them. *See* Petition at p. 2, ¶4 (emphasis added). The Petitioners further argue that the Order “could potentially be used” to subject them to “numerous and lengthy depositions.” *Id.* at p. 3, ¶6 (emphasis added). The Petitioners then ask that certain entities be excused from the requirement to

be available for deposition except where they intend to present a witness at the hearing and that certain entities be excused from the requirement to respond to requests for production of documents. *Id.* at p. 5, ¶¶8(2),(3). For the reasons set forth below, the Commission denies these requests.

As explained above, the Initial Procedural Order allows entities like the Petitioners to object to discovery that is served upon them, and it encourages the parties to work together to resolve any objections to discovery requests. If the parties cannot resolve disputes regarding such objections among themselves, the Initial Procedural Order specifically provides that the Executive Assistant to the Commissioners will rule on such objections expeditiously, and it provides that the Commission can review such rulings. Thus, if the Petitioners are served with discovery requests that they believe are objectionable, Petitioners have substantial opportunity to be heard on their objections. In fact, the Commission notes that the Petitioners have already come before the Commission to request an extension of time to answer discovery requests, and the Commission already has ruled on that request. The Petitioners, therefore, have not and will not suffer any prejudice as a result of the procedures established in the Initial Procedural Order.

Accordingly, rather than arbitrarily limiting the means by which the parties may obtain relevant information based on speculative concerns, the Commission finds that it is more appropriate for such entities to file objections if and when those entities believe that they have been served with discovery that is excessive or inappropriate and after they have exhausted good-faith attempts to resolve their concerns with the party seeking the discovery. This approach will afford Petitioners an opportunity for protection against

unreasonable discovery requests without depriving other parties of an opportunity to collect information that is relevant to the significant and important matters the Commission must decide in these proceedings.

III. CONCLUSION

For all of the reasons set forth above, the Petition is denied. This Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED

BY ORDER OF THE COMMISSION:

/s/
Randy Mitchell, Chairman

ATTEST:

/s/
G. O'Neal Hamilton, Vice Chairman

(SEAL)